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No. 81-65

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN M. BEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a fatal variance existed between the indictment and the proof at trial.

2. Whether petitioner's prosecution was barred by the statute of limitations.

3. Whether petitioner was denied a fair trial by the giving of a modified *Allen* instruction.

4. Whether the district court abused its discretion in refusing to disclose to defense counsel a post-trial letter it received from a juror.

5. Whether the evidence was sufficient to support petitioner's conviction under the Hobbs Act, 18 U.S.C. 1951.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-19 to A-20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1981. The petition for a writ of certiorari was filed on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to four years' imprisonment and fined $2,000. The court of appeals affirmed (Pet. App. A-19 to A-20).

The evidence showed that Robert Kenneth Vann was the owner and operator of the Sanitary Disposal Company (SDC), a collector of residential and commercial refuse in Knox County, Tennessee (A. 107-108).[1] In September 1972, Browning Ferris Industries, Inc. (BFI) acquired SDC (A. 108). Both before and after the merger into BFI, the disposal company purchased a substantial amount of materials from outside Tennessee (A. 109-110; Gov't Exhs. 1-1 through 1-65).

As a result of action taken by the Tennessee Legislature, two Knox County landfills used by SDC were to close on July 1, 1972 (A. 114). Two alternative landfill sites were proposed to the Knox County Board of Commissioners: one in Monroe County and another within Knox County (A. 116-117). Vann projected that the Monroe County site would be financially "disastrous" for his company (A. 118-120, 127).

From 1970 through 1977, petitioner was the Commissioner of Welfare for Knox County and, as such, held a seat on the county's Board of Commissioners. On July 4, 1972, petitioner and Vann met. Petitioner explained to Vann that he would need $30,000 to support the Knox County landfill site (A. 127). He further stated that he would require future payments of $2,500 per month for a period of two years and $1,500 per month for three years thereafter. Vann agreed to these demands (A. 129-130).

Vann paid petitioner $20,000 on July 6, 1972 (A. 132-134). Four days later, the three-member Board of Commissioners unanimously approved the Knox County site (A. 243-249). On July 11, Vann paid petitioner an additional $10,000, and once a month between January 1973 and November 1975 he paid petitioner $2,500 (A. 141). These

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[1] "A." refers to the joint appendix filed in the court of appeals.

monthly payments, which totalled $87,500, ended when BFI's parent firm brought the payments to the attention of the Securities and Exchange Commission (A. 272-276, 283-284).

ARGUMENT

1. Petitioner contends that a fatal variance existed between the indictment and the proof at trial (Pet. 18-21). Specifically, he argues that evidence of the July 4, 1972 agreement between himself and Vann was inadmissible because the agreement had not been alleged in the indictment. He relies on the court of appeals' decision reversing his first conviction in this case. *United States* v. *Beeler*, 587 F. 2d 340 (6th Cir. 1978). There, the court held that the government's failure to allege the 1972 agreement and the two 1972 payments in the indictment[2] precluded the introduction of proof concerning them at trial.

The present indictment alleged that "from on or about July 6, 1972, up to and including November 26, 1975" petitioner extorted $117,500 from Vann, SDC, and BFI (Pet. App. A-13). Accordingly, the indictment clearly charged the July 6 and July 11, 1972 payments. While the indictment did not expressly allege the July 4 agreement, the agreement was implicit in the allegations that the payments had been made and that petitioner had "induced" them "under color of official right and through the wrongful use of financial fear and economic injury" (*ibid.*).

The government, furthermore, was not required to allege the agreement in the indictment specifically, since actual agreement to make an extortionate payment is not an element of a Hobbs Act offense. The only two elements of the offense are (1) interference with commerce (2) by robbery or

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[2]The indictment charged petitioner only with receiving the 35 monthly payments of $2,500 from January 1973 through November 1975.

extortion. *Stirone* v. *United States*, 361 U.S. 212, 218 (1960).[3] "Extortion" is defined in Section 1951(b)(2) as "the obtaining of property * * * induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Accordingly, while evidence of the agreement was clearly admissible to show that the payments had been obtained "under color of official right," the failure to allege the agreement in the indictment was not error. See *Stirone* v. *United States, supra*, 361 U.S. at 218.

2. Vann's first two payments to petitioner occurred on July 6 and July 11, 1972, and the present indictment was returned on March 21, 1979. Petitioner contends that his conviction should be reversed because these payments fell outside the five-year limitation period of 18 U.S.C. 3282 (Pet. 22-24). His claim is without merit.

The courts of appeals that have addressed the issue have upheld indictments under the Hobbs Act that allege a single continuous plan of extortion involving multiple payments beginning outside the statute of limitations but continuing to a date within the statute. *United States* v. *Forszt*, No. 80-2392 (7th Cir. July 27, 1981), slip op. 5; *United States* v. *Hedman*, 630 F. 2d 1184, 1199 (7th Cir. 1980); *United States* v. *Provenzano*, 334 F. 2d 678, 684-685 (3d Cir.), cert. denied, 379 U.S. 947 (1964). Here, the indictment charged in one count that petitioner had engaged in a unitary plan of extortion involving multiple payments over several years. These payments continued through November 1975, well within the statute of limitations. Accordingly, the

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[3]The Hobbs Act provides in pertinent part (18 U.S.C. 1951(a)):

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

indictment was not defective.[4] Moreover, any danger that the jury convicted petitioner solely on the basis of time-barred July 1972 payments was vitiated by the court's instruction, in answer to a specific question from the jury, that in order to convict it must find that petitioner extorted approximately the entire amount alleged in the indictment (Tr. 922-923).[5]

3. Petitioner contends that the trial judge coerced the jury by giving a modified *Allen* instruction (Pet. App. A-14 to A-15) after the jury had deliberated for approximately 17½ hours and had reported itself "hopelessly deadlocked" (Pet. 9-15).

Although the court instructed the jury that this was "an important case to both sides," that if the jury was unable to reach a verdict "the case [would be] left open and undecided," and that "[l]ike all cases [this case] has got to be disposed of sometime," the court balanced this language by cautioning that "[n]o juror should surrender his or her honest convictions as to the weight or effect of the evidence, for his or her fellow jurors or for the purpose simply of returning a verdict * * *" (Pet. App. A-14 to A-15). The court emphasized that each juror, whether in the minority or majority, should reconsider his views in the light of the opinions of the other jurors (*ibid.*). The instruction thus reminded the jury of its task to reach a verdict if possible while providing ample protection against the danger that the jury would perceive the instruction as requiring a verdict or suggesting a particular verdict. See *Allen* v. *United States*, 164 U.S. 492, 501 (1896); *United States* v. *Dyba*, 554 F. 2d 417, 420-421 (10th Cir.), cert. denied, 434

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[4]Petitioner's argument that the indictment upon which he was initially tried did not toll the running of the statute of limitations does not aid his cause, since the present indictment, as we have shown, would not have been time-barred even if there had been no earlier indictment.

[5]"Tr." refers to the trial transcript.

U.S. 830 (1977); *Munroe* v. *United States*, 424 F. 2d 243, 245-247 (10th Cir. 1970).

Contrary to petitioner's assertion (Pet. 9), the decision in this case does not conflict with decisions in other circuits. As petitioner notes, some courts of appeals in the exercise of their supervisory powers have specified a particular charge to be given instead of the traditional *Allen* charge. See *United States* v. *Angiulo*, 485 F. 2d 37 (1st Cir. 1973); *United States* v. *Thomas*, 449 F. 2d 1177 (D.C. Cir. 1971) (en banc); *United States* v. *Fioravanti*, 412 F. 2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969); *United States* v. *Brown*, 411 F. 2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970). Naturally, the instruction here differs somewhat from the language specified by those courts. However, it does alleviate the primary concerns expressed by those courts in that it does not urge only the minority to reconsider its position nor state that the case must be retried if the jury fails to reach a verdict. See *United States* v. *Angiulo*, *supra*, 485 F. 2d at 39; *United States* v. *Thomas*, *supra*, 449 F. 2d at 1182-1183; *United States* v. *Fioravanti*, *supra*, 412 F. 2d at 417; *United States* v. *Brown*, *supra*, 411 F. 2d at 932-933. Accordingly, the finding of the court below that the instant supplemental charge was not impermissibly coercive does not establish a conflict with any other circuit.

Furthermore, such differences as there are among the circuits with regard to the proper instruction to be given to deadlocked juries are not of such a nature as to impair the equitable administration of federal criminal justice or to require the intervention of this Court for the purpose of establishing a uniform rule governing the precise wording of such instructions. This "*Allen* charge" issue has been repeatedly presented to the Court over the last decade, and review has been consistently denied. There is no reason for a different outcome in this case.

4. After the jury returned its verdict, a juror mailed a letter to the trial judge that discussed in general terms the jury's deliberative process (Pet. App. A-16). The judge entered an ex parte order (*id.* at A-16 to A-18) holding that under Fed. R. Evid. 606(b) the letter was inadmissible in any proceedings concerning the validity of the jury's verdict. He then placed the letter in the court file under seal, refusing to allow defense counsel to inspect it. Petitioner contends that the judge erred in failing to disclose the letter (Pet. 15-18).

Rule 606(b) broadly prohibits admission into evidence of any juror's statement concerning the jury's deliberations, except in those circumstances where the statement is relevant to the question "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The district court found that the letter "contained no allegations of extraneous or outside influence, or misconduct or incompetence on the part of any juror" that would have entitled petitioner to challenge the validity of the verdict under Rule 606(b) (Pet. App. A-16). The court of appeals, after examining the letter, agreed (*id.* at A-20). The district court also found that the letter suggested "no avenues of investigation which might produce admissible evidence" (*id.* at A-17).[6] In short, the court carefully considered the letter and determined that its release to the parties would serve "no useful purpose" (*ibid.*).[7] In view

[6]Petitioner argues (Pet. 17) that the letter might have contained information reflecting the alleged coercive nature of the modified *Allen* charge given to the jury. As we have shown, however, the charge was altogether proper and noncoercive. Furthermore, under Rule 606(b), the letter would not have been admissible for purposes of challenging the charge.

[7]The district court correctly ruled that the policies of finality and privacy of jury deliberations underlying Rule 606(b) would best be served by sealing the letter, particularly in view of the substantial publicity this case had generated (Pet. App. A-17).

of these findings, and the fact that petitioner's right of appeal was fully protected by the inclusion of the letter under seal in the trial record, the decision to withhold the letter was not error.[8]

5. Petitioner contends tht the evidence was insufficient to support his conviction under the Hobbs Act, 18 U.S.C. 1951 (Pet. 21-22). This claim is without merit.

First, petitioner argues that the evidence fell short of establishing that when Vann made the $2,500 monthly payments he held a reasonable belief that petitioner's office included the ability to affect his rights. See *United States* v. *Harding*, 563 F. 2d 299, 306-307 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978). He bases this argument on Vann's testimony that the landfill was under the control of the City of Knoxville and not that of the Knox County Board of Commissioners at the time of the payments (A. 190). However, petitioner overlooks the fact that the payments were made pursuant to an agreement entered into when the Board of Commissioners did have power and control over the landfill (A. 114-115). See *United States* v. *Forszt, supra*, slip op. 5 (Hobbs Act violated when public official "sell[s] his public trust while in office even though the last installment for the services rendered is to come after he leaves office"). Moreover, Vann testified that by making the payments he believed he would be in a favorable position when the landfill expired and the county was required to seek another landfill site (A. 160-161, 209-210).

Petitioner also argues that there was no evidence that the initial $30,000 in payments from Vann affected commerce within the meaning of the Hobbs Act (Pet. 22). Even if

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[8]Petitioner's reliance on *United States* v. *Moten*, 582 F. 2d 654 (2d Cir. 1978), does not aid his cause. Unlike here, the evidence withheld in *Moten* was relevant to a possible jury tampering effort and therefore would have been admissible under Rule 606(b) in any inquiry into the validity of the verdict.

petitioner were correct, however, his conviction would still be valid since he makes no claim that the monthly payments aggregating $87,500 did not affect commerce. In any event, there is evidence that the July 1972 payments affected interstate commerce. Although Vann testified that the $30,000 was paid out of his personal funds, the money was originally obtained by means of bank loans (A. 132, 137) which were partially repaid with funds generated by side operations of SDC (A. 163), which was shown to be involved in interstate commerce (A. 109-110; Gov't Exhs. 1-1 through 1-65). See *United States* v. *Rabbitt*, 583 F. 2d 1014, 1023 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). Finally, in order to establish the requisite nexus with interstate commerce it is not necessary for the government to show that the extorted payments depleted the funds of an interstate business, as petitioner apparently assumes. It is sufficient that the failure to yield to the extortionate demands might have caused some detriment to a business involved in interstate commerce. See *United States* v. *Kuta*, 518 F. 2d 947, 950-951 (7th Cir. 1975); *United States* v. *DeMet*, 486 F. 2d 816, 822 (7th Cir. 1973); *United States* v. *Hyde*, 448 F. 2d 815, 836, 837 (5th Cir. 1971). Here, Vann testified that location of the landfill in Monroe County would have been "disastrous" for SDC (A. 127).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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